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Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WINSTON J. PERRON,

Petitioner

versus

BELL MAINTENANCE AND FABRICATORS, INC.,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit Court of Appeals' decision rendering employees of two different subcontractors, who may be "borrowed employees" of the same general contractor, co-employees for LHWCA 33 U.S.C. 933(i) immunity purposes and further rendering the employer of the negligent employee immune from both compensation and tort liability to the injured party is contrary to Congress' 1984 legislative amendments to 33 U.S.C. 904(a) and 905(a); or, alternatively stated, may the Fifth Circuit ignore the language of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 904(a) and 905(a) in creating its "borrowed co-employees" doctrine to grant tort immunity to a subcontractor who will never be responsible for compensation to the injured

employee of another subcontractor.

LIST OF ALL PARTIES TO THE PROCEEDING

Winston J. Perron
Represented by Donald G. Cave
Cave & McKay

United States Fire Insurance Company
Represented by John H. Hughes
Allen, Gooch, Bourgeois, Breaux, Robison and Theunissen

Bell Maintenance & Fabricators, Inc.
Represented by James R. Sutterfield and James R. Holmes
Hoffman, Sutterfield, Ensenat & Bankston

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PETITION FOR A WRIT OF CERTIORARI TO
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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Winston J. Perron, the petitioner herein, prays for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the

Fifth Circuit entered in the above entitled case on August 21, 1992.

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit sought for review, reported at 970 F.2d 1409 and included in Appendix A of this Petition on pages A-1 through A-19, affirmed the district court's grant of summary judgment in favor of Bell Maintenance. A timely Petition for Rehearing, not yet reported, but printed in Appendix A on page A-37, was denied on September 22, 1992.

The judgment of the United States District Court for the Eastern District of Louisiana, unpublished, but printed in Appendix A of this Petition on pages A-20 through A-26, granted summary judgment for Bell Maintenance, finding that Perron's action against Bell Maintenance as a third-

party respondeat superior for injuries to Perron allegedly sustained by the negligence of a Bell Maintenance employee was barred under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") because the employee and Perron were fellow-servants of Gulf Oil. Petitioner's Motion to Reconsider was denied on March 18, 1991. (Appendix, pages A-27 through A-36).

JURISDICTION

Jurisdiction in the lower court is based upon the Outer Continental Shelf Lands Act, 43 U.S.C. 1331, et seq. Further, this matter includes provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(3), 902(4), 904(a), 905(a), and 933(a), (h), and (i).

Jurisdiction of the United States Supreme Court is invoked pursuant to 28

U.S.C. 2101(c), as well as under 28 U.S.C. 1254. The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 21, 1992. (Appendix A, page A-1.) A timely Petition for Rehearing was denied on September 22, 1992. (Appendix A, page A-37.)

STATUTES INVOLVED

33 U.S.C. 901

33 U.S.C. 902(3)

33 U.S.C. 902(4)

33 U.S.C. 904(a)

33 U.S.C. 905(a)

33 U.S.C. 933(a)

33 U.S.C. 933(h)

33 U.S.C. 933(i)

STATEMENT OF THE CASE

In 1980, Danos & Curole Marine Contractors, Inc. ("Danos & Curole")

entered into a written contract with Gulf Oil Corporation to furnish general oilfield labor, equipment, and boats, inshore and offshore, and such other work as is generally performed by Danos & Curole in the usual line of service.

In 1983, Winston Perron, petitioner herein, was hired by Danos & Curole to work as an operator and was subsequently assigned to work on Gulf's production platform in Block 238 of Eugene Island Field as a pumper/lease operator. This platform was staffed with two crews consisting of two men each. The day shift consisted of a Gulf mechanic and a Bell Maintenance employee, Mike Lee. The night shift consisted only of the petitioner and another Danos & Curole employee who answered to petitioner.

On March 3, 1985, while Perron was performing his duties on this platform, he

stepped on a foreign substance which had accumulated on the deck of the platform near the compressor station causing him to slip and fall on his shoulder and back resulting in serious injuries. The accumulation was allegedly caused by Lee's failure to clean the deck after re-assembling some equipment. Petitioner alleges that his injuries were caused by the negligence of Bell and/or its agents, servants and employees or those otherwise for whom it was legally responsible, namely its employee, Lee. Petitioner sued Bell in Louisiana state court; the cause was removed to federal court for the Eastern District of Louisiana, and the district court granted a summary judgment holding that Bell was immune from tort liability because Bell's employee and Danos & Curole's employee (Perron, petitioner) were borrowed co-employees of Gulf Oil, the

platform owner. The Fifth Circuit affirmed the lower court's summary judgment and denied petitioner's rehearing. Hence, this application for a writ of certiorari.

In a related action, Perron was held to be a "borrowed servant" of Gulf pursuant to an order granting summary judgment by the United States District Court for the Western District of Louisiana. Moreover, this ruling was affirmed by the United States Court of Appeals for the Fifth Circuit and a subsequent denial of a Writ of Certiorari by the United States Supreme Court.

Petitioner received LHWCA benefits provided by insurance purchased by his employer, Danos & Curole.

REASONS FOR GRANTING THE WRIT

I. POLICY OF THE LHWCA DOES NOT LEND ITSELF TO THE APPLICATION OF THE BORROWED EMPLOYEE CONCEPT TO PARTIES BEYOND THE BORROWING EMPLOYER.

A. POLICY REASONS OF THE LHWCA

The concept of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") is based on a quid pro quo: the employer provides compensation, even when it is without fault, but in exchange for that certainty of benefits, the employee gives up his right to maintain against his employer a negligence action for his injuries. 33 U.S.C. 904 and 905(a). Actions against co-employees of the injured employee are also given up. 33 U.S.C. 933(i). However, the LHWCA does preserve the employee's right to maintain negligence actions against third party tortfeasors who are not responsible for compensation

benefits to the injured employee.

Furthermore, to prevent confusion in those industries where contractors employ subcontractors to supply certain services, § 904(a) of the LHWCA expressly provides that where the employer of the injured employee is the subcontractor, the general contractor is only liable for providing the compensation when the subcontractor fails to provide it. (emphasis added). In addition, § 905(a) provides that for purposes of immunity, the general contractor is deemed the employer of the subcontractor's employee only if the subcontractor fails to secure the compensation under § 904(a). Such is not the case here. Gulf Oil, the platform owner and general contractor, did subcontract with Danos & Curole and Danos & Curole provided the LHWCA compensation benefits to Perron. A plain reading of the

two statutes indicates that Gulf Oil would be the employer of Perron and thus immune from a negligence action only if Danos & Curole failed to provide compensation to Perron. Again, this is not the case. Danos & Curole did provide Perron with compensation, thereby precluding Gulf from being the employer of Perron for LHWCA purposes.

Bell Maintenance, the employer of an allegedly negligent employee (Mike Lee), had no responsibility to Perron for compensation; there is no quid pro quo between Perron and Bell Maintenance, and Bell Maintenance is not immune from tort liability to the injured Perron.

B. APPLICATION OF BORROWED SERVANT DOCTRINE

To circumvent tort liability, general contractors such as Gulf contend that they

are borrowing employers and thus should receive the same immunity as the employer-subcontractor. This was the circumstance in the related case of Perron v. Gulf Oil Corp., 893 F.2d 344 (5th Cir. 1989), cert. denied, ____ U.S. ____, 110 S.Ct. 3273, 111 L.Ed.2d 782 (1990), where the Fifth Circuit held that Gulf, as the borrowing employer of Perron, was immune from tort liability.

While the borrowed servant doctrine has been in existence since 1909, it was not applied to LHWCA cases until 1969. Ruiz v. Shell Oil Company, 413 F.2d 310 (5th Cir. 1969); Standard Oil Co. v. Anderson, 212 U.S. 215, 220, 29 S.Ct. 252, 253, 53 L.Ed. 480 (1909). Although the doctrine was applied in Ruiz, the Fifth Circuit held that the requirements for a borrowed servant relationship were not present in the Ruiz case.

Conceivably, a quid pro quo

relationship exists between the borrowing employer (Gulf) and the borrowed employee (Perron). Gulf ultimately pays for the services of Perron through invoices submitted by Danos & Curole and Perron receives wages from his employer for performing Gulf's work. Although Gulf did not provide Perron's LHWCA compensation, Danos & Curole's cost for obtaining insurance is passed on to Gulf.

C. INTENT OF CONGRESS IS CIRCUMVENTED BY THIS FIFTH CIRCUIT DECISION.

Bell contends that its employees and Danos & Curole's employees are borrowed employees of Gulf and co-employees of one another and thus immune from suits filed by co-employees under § 933(i) of the LHWCA. Extending immunity to employees of other subcontractors is not only unjustified under the LHWCA, but is contrary to the

policy of the LHWCA and the intent of Congress. While a quid pro quo relationship exists between Perron and Danos & Curole and conceivably between Perron and Gulf, one does not exist between Perron and Bell. Bell does not provide nor is Bell ever liable for compensation to Perron. Furthermore, Bell does not ultimately pay for the services of Perron like Gulf and Perron does not receive wages for performing Bell's work. There is no quid pro quo between Bell and the injured employee.

Perron and Lee work for different subcontractors and though they may be borrowed employees of Gulf, neither is a borrowed employee of the other's employer, i.e., Perron is not a borrowed employee of Bell and Lee is not a borrowed employee of Danos & Curole.

Under the LHWCA definition of

"employee", Perron and Lee are both employees, but are not co-employees of the same employer. 33 U.S.C. 902(3). In § 902(4) of the LHWCA, "employer" is defined as "an employer any of whose employees are employed in maritime employment.. ." Applying this definition, Bell is an employer as to any of its employees employed in maritime employment. Lee fits this description, as he is an employee of Bell employed in maritime employment. Perron, however, is not an employee of Bell. Likewise, Lee is not an employee of Danos & Curole.

Congress in § 933(a) of Title 33 stated:

> "If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect

> whether to receive such compensation or to recover damages against such third person."

Applying § 933(a) to the instant case, Perron need not elect whether to receive compensation from Danos & Curole or to recover damages against a third person. Perron is entitled to recover compensation from his employer, Danos & Curole, as well as damages from Bell for the negligence of "some person (Lee) other than the employer or a person or persons in his employ" under § 933(a).

In addition, § 933(h) of Title 33 provides that:

> "Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section."

The intent of this provision was to allow the insurance carrier to step in the shoes

of the injured employee's employer and recover any amount it has paid in compensation from the injured employee's larger recovery from the wrongdoer. By assuming the payment of compensation to Perron, Danos & Curole's insurance carrier is subrogated to the rights of Danos & Curole. However, due to the Fifth Circuit's application of the borrowed and fellow-servant doctrines, the insurance company is not entitled to recover for the benefits paid to Perron, as Perron does not have a right of action against the tortfeasor, and this results in the defeat of Congressional intent.

Where the injured employee's employer is at fault, the insurance carrier is not entitled to recover from the compensation paid to the employee. But where the fault of the employee's injury is caused by a person other than the employer or an

employee of that person, it was Congress' intent for the insurance carrier to recover from the wrongdoer for any amounts paid out. Extending the borrowed and fellow-servant doctrines to other subcontractors, such as Bell, and granting them tort immunity circumvents the intent of Congress, provides no incentive for safety, and grants immunity to one who causes the injury.

Congress further stated in 33 U.S.C. 933(i) that:

> "The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, . . . by the negligence. . .of any other person. . .in the same employ: *Provided*, That this provision shall not affect the liability of a person other than an. . .employee of the employer."

On its face, the first clause of this provision seems to indicate that Perron's remedy is limited to LHWCA because Perron

and Lee are employed in the same type of business; however, further reading is necessary as the second clause modifies the first clause. The second clause of the statute indicates that the first clause does not apply to any persons other than employees of the employer. The express language for this modification is "Provided". Persons in the same employ are immune, *provided*, they are an employee of the injured employee's employer. Since Danos & Curole is the employer of Perron, only employees of Danos & Curole are granted the § 933(i) immunity of the LHWCA. Because Lee is an employee of Bell, he does not fall within the § 933(i) protection, but instead falls within the language of "a person other than an. . .employee of the employer", (e.g., Danos & Curole). Section 933(i) immunity appears to be expressly limited to "employees" of Danos & Curole;

to provide otherwise circumvents the policy and intent of the statute.

The LHWCA does not define "persons in the same employ". A close reading of this language in connection with 33 U.S.C. 933(a), (h), and (i), as well as 904(a) and 905(a), would indicate that it refers to persons who work for the same employer. Moreover, since the immediate employer is liable for the injured employee's compensation, Congress must have meant persons employed by the employer that provides their compensation. This interpretation follows the clear intent of the LHWCA. In addition, the Ninth and Eleventh Circuits have interpreted this phrase to mean persons who work for the same employer are persons in the same employ for § 933(i) purposes. Calder v. Crall, 726 F.2d 598 (9th Cir. 1984), cert. denied, 469 U.S. 857, 105 S.Ct. 185, 83

L.Ed.2d 118 (1984); Traywick v. Juhola, 922 F.2d 786 (11th Cir. 1991).

The district court's opinion that Perron and Lee are co-employees, thus immunizing Bell from liability, is based on its analysis of four cases, Nations v. Morris, 483 F.2d 577 (5th Cir. 1973); Sharp v. Elkins, 616 F.Supp. 1561 (W.D.La. 1985); Capps v. N.L. Baroid-NL Industries, Inc., 784 F.2d 615 (5th Cir.) cert. denied, 479 U.S. 838, 107 S.Ct. 141, 93 L.Ed.2d 83 (1986); West v. Kerr-McGee Corp., 765 F.2d 526 (5th Cir. 1985).

Three of the cited four cases involve the liability of a general contractor for injuries sustained to a borrowed employee by the negligence of the contractor's employee. These three cases are factually distinguished from the instant case because Perron was not injured by the general contractor, Gulf's employee, but allegedly

was injured by Lee, an employee of a subcontractor of Gulf.

The Nations case involves two employees of the same employer, which is clearly not the facts of this case. None of the cited cases contemplate the question of a subcontractor's liability for his employee's negligence in injuring another subcontractor's employee where both of the employees are borrowed servants of the same general contractor.

Under the Fifth Circuit's analysis, any person who would otherwise be a third party and subject to tort liability is considered a fellow servant and thereby immune from tort responsibility. For example, assume an employee of an independent inspection company comes to the platform for an inspection; if found to be the borrowed employee of Gulf, this inspector will be a fellow servant of

Perron and all other borrowed employees of Gulf. This was never the intent of Congress. Due to the court's tendency in finding a borrowing relationship between contractors and subcontractors and this unwarranted extension of the fellow servant doctrine, third parties cease to exist in cases where a general contractor and subcontractors are involved. Application of the borrowed servant status and fellow servant doctrine was never meant to extend into denying tort recovery against a party who is not responsible for compensation benefits. Bell was not and will never be responsible to Perron for LHWCA benefits and thus has no immunity for tort liability to Perron.

An interesting analysis of the Longshoremen's and Harbor Workers' Compensation Act was made by Judge Brown writing for the Fifth Circuit panel in the

case of Probst v. Southern Stevedoring Company, 379 F.2d 763 (5th Cir. 1967). Although the Probst decision was before certain amendments to the LHWCA, the method of statutory construction is pertinent and applicable to the instant Perron case.

In the Probst decision, the general contractor was sued by Probst, an injured employee of the subcontractor employer (Atlantic & Gulf Stevedores, Inc.) The district court held "the general contractor, a third person, had the employer's immunity and was therefore not a third person subject to being sued." The Fifth Circuit Court of Appeals disagreed and reversed the lower court's summary judgment.

The Probst court, in analyzing the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq., stated:

> "Starting, and for that matter ending, with the statute as we must, there is no doubt at all about the right of the injured employee to bring the suit. The Act expressly accords this right and prescribes elaborate machinery for settlement, apportionment of recovery, and the like. This right against the third party is extended to the employer of a self-insurer or to his insurance carrier if insured."

Probst allows suits against "general contractors" as did Judge Tate's concurring opinion in West v. Kerr-McGee, 765 F.2d 526 (5th Cir. 1985).

Clearly, under the present intent of Congress as set forth in the LHWCA, there is no policy or statute that establishes and extends a secondary protective policy to the subcontractor who is not the employer of the injured employee and is not liable for compensation.

As set forth in Probst:

> ". . .certainly at this late date a holding narrowing,

withdrawing, or restricting the rights of an injured ambiguous-amphibious worker would be stemming the strong judicial tide. . . And the action of Congress, surely aware of the dynamic developments in this field of law, flow in the same direction.

We therefore reach the same conclusion as the only two earlier cases did. Thomas v. George Hyman Constr. Co., D.C.D.C. 1959, 173 F.Supp. 381, and Liberty Mut. Ins. Co. v. Goode Constr. Co., E.D.Va. 1951, 97 F.Supp. 316 (each under the District of Columbia statute which incorporates the Longshoremen and Harbor Workers Act)." Probst, supra, p. 767.

II. LANGUAGE OF THE 1984 AMENDMENTS OF THE LHWCA ABOLISHES THE BORROWED SERVANT DOCTRINE.

This court held in Washington Metropolitan Area Transit Authority v. Johnson, 467 U.S. 925, 104 S.Ct. 2827, 81 L.Ed.2d 768 (1984), that the general contractor was immune from liability where it was potentially liable for compensation.

In response, Congress amended Sections 904(a) and 905(a) of the LHWCA to provide that the general contractor is only liable for providing compensation where the subcontractor fails to provide it. In addition, for purposes of immunity, the general contractor is deemed the employer of the subcontractor's employees only if the subcontractor fails to secure compensation as required by Section 904. A plain reading of these two statutes would indicate that the general contractor is the employer of an injured subcontractor's employee and thus immune from tort liability only if the subcontractor failed to provide compensation and the general contractor was thereafter required to provide it to the injured employee. However, where the subcontractor provides the compensation, the general contractor is not an employer of the injured employee for

purposes of LHWCA. This was a matter for congressional consideration rather than administrative or judicial consideration and Congress has clearly spoken in 33 U.S.C. 905(a):

> ". . .For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title." (Emphasis added.)

The Fifth Circuit has held that the 1984 amendments of § 904(a) and 905(a) did not abolish the borrowed servant doctrine. West v. Kerr-McGee, 765 F.2d 526 (5th Cir. 1985). The court's holding focused on the legislative history of the amendments. However,

> "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intent to the contrary, the language must ordinarily be regarded as

> conclusive." Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). See also Probst v. Southern Stevedoring Company, supra.

Questions of federal law that turn on a statute are resolved first by looking to the statutory language, and then to the legislative history if the statutory language is unclear. Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984). By looking to the legislative history first, a majority of the Fifth Circuit in West has departed from this principle of statutory construction. Judge Tate's concurring opinion in West, supra, states at page 533:

> "The statutory language is explicit, and it makes functional sense: only where an employer is liable for the compensation remedy provided by the Act is that remedy made exclusive against him for the employee's injuries. . . ."

> "The statutory language is explicit and free from ambiguity. No consideration of the statute itself or of its other provisions gives rise to any implication of doubt as to the legislative intent."

Again quoting from Probst, supra, page 765:

> "Starting, and for that matter ending, with the statute as we must, there is no doubt at all about the right of the injured employee to bring the suit."

The bare language of the amendments in 33 U.S.C. 904(a) and 905(a) provides a clear interpretation of the two provisions. The statutory contruction does not indicate any Congressional intent for the contractor who receives immunity from compensation to also receive immunity from tort liability; further and even clearer, there is no congressional intent for a subcontractor to receive immunity from tort liability when its employee injures another subcontractor's employee like Perron.

This clear construction is consistent with the definition of "employer" provided in § 902(4). In all cases, the employer of an employee is determined by the § 902(4) definition; however, in the case of a subcontractor and a general contractor, § 904(a) and 905(a) provide one exception to the general rule--that the general contractor shall be the employer only if the subcontractor fails to fulfill its statutory duty of providing compensation. The amendments essentially adopt the view of the three judges who dissented in WMATA. Writing for the dissenters, Justice Rehnquist contended that in only one circumstance could the contractor be immune (i.e., as set forth in the amendment of 33 U.S.C. 905(a) - only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title).

Not only does the straightforward

language of the amendments correct the troublesome holding of WMATA, but the amendments clearly abolish the doctrine of borrowed servants under the LHWCA. Although consideration of the legislative history is unnecessary where the language is clear, petitioner notes that just as the legislative history does not indicate an express intent to abolish the borrowed servant concept, the language also does not indicate an intent to retain the judicial doctrine, and the court is obligated to follow the statute.

Since the borrowed servant doctrine (a judicial doctrine) is not in the LHWCA and has not been retained in the LHWCA amendments of 1984, this doctrine should not be extended to § 933(i) especially with the language, "*Provided*, That this provision shall not affect the liability of a person other than an officer or employee

of the employer."

Since Bell did not provide compensation benefits for Perron, Bell has no tort immunity. Clearly, Danos & Curole is Perron's employer. Danos & Curole's compensation carrier has paid substantial LHWCA benefits to and on behalf of Perron. The defendant, Bell Maintenance, has not paid compensation to Perron, is not responsible for payment of compensation to Perron, and will never be responsible for payment of compensation to Perron under the LHWCA.

Perron's exclusive remedy against his employer, Danos & Curole, was and is LHWCA benefits.

Only if Danos & Curole "fails to secure the payment of compensation" would the contractor, Gulf "be deemed the employer of Perron." This did not occur and thus Gulf is not the employer of Perron

under the clear reading of explicit statutory language of 33 U.S.C. 904(a) and 905(a).

The lower court's decision in this case is contrary to the clear statutory language of Congress in 33 U.S.C. 904(a), 33 U.S.C. 905(a), and 33 U.S.C. 933(a), 933(h) and 933(i).

Prior to the 1984 amendments, 904(a) provided that the general contractor was to provide compensation unless the subcontractor provided it. Under Section 905(a), the injured employee was precluded from suing his "employer". This court in WMATA found § 905(a) to be ambiguous when applying the employer's immunity to an injured employee of a subcontractor. The issue in WMATA was whether the employer's immunity extended to the general contractor. The court held yes, because the general contractor was potentially

liable for the LHWCA compensation to the injured employee of the subcontractor. In WMATA, the general contractor had provided the compensation and the court indicated the general contractors were especially immune when they did provide the compensation.

Bell Maintenance has no obligation to Perron for compensation benefits; has not provided any compensation benefits; is not the employer of Perron; and this Honorable Court should find that Perron is entitled to recover damages from Bell because Bell is a third party tortfeasor within the meaning of 33 U.S.C. 933(a) and 33 U.S.C. 933(i).

CONCLUSION

Granting immunity to employees of a subcontractor where the injured employee, employed by another subcontractor and the allegedly negligent employee are borrowed servants of another contractor is not authorized by § 933(i) of the LHWCA. Not only has the Fifth Circuit misconstrued the plain language of the act, it has neglected to consider the underlying basis of the act in rendering its decision. Petitioner herein, Perron, contends that this unwarranted extension of immunity to a subcontractor who causes injury to another subcontractor's employee is without authority or precedent and is contrary to and circumvents the intent of Congress as expressed in 33 U.S.C. 904(a), 905(a), and 933(a), (h), and (i). Congress has clearly given injured employees a right of action

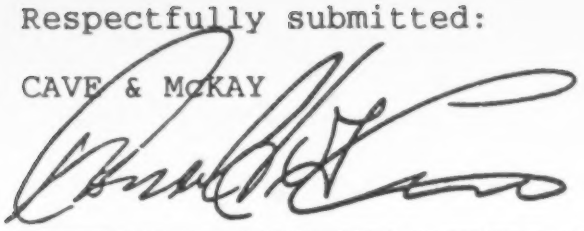
against third party tortfeasors in addition to granting subrogation rights to insurance carriers providing compensation to the employee, both of which have been taken away by the Fifth Circuit's decision.

Petitioner requests this Honorable Court to grant a writ of certiorari in order to determine to what extent the borrowed and fellow-servant doctrines apply to the LHWCA in light of Congress' clear intent of the act. The Fifth Circuit decision as it stands is clearly contrary to the purpose and intent of Congress and to the Fifth Circuit decision in Probst v. Southern Stevedoring Company.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted:

CAVE & McKAY



Donald G. Cave, LSBA No. 4073
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December ~~November~~ 4, 1992

CERTIFICATE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record by placing a copy of same in the United States mails, postage prepaid and properly addressed to:

John H. Hughes, Esquire
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HOFFMAN, SUTTERFIELD, ENSENAT & BANKSTON
21st Floor, Poydras Center
650 Poydras Street
New Orleans, LA 70130-6121

Baton Rouge, Louisiana, this 4 day of ~~November~~ December, 1992.

Donald G. Cave

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3351

FILED
AUG 21 1992

WINSTON J. PERRON,

Plaintiff-Appellant,

UNITED STATES FIRE INSURANCE COMPANY,

Intervenor-Appellant,

VERSUS

BELL MAINTENANCE AND FABRICATORS, INC.,

Defendant-Appellee

Appeals from the United States
District Court for the Eastern
District of Louisiana

Before BRIGHT,[1] JOLLY, and BARKSDALE, Circuit Judges. PER CURIAM:

Winston Perron and Michael Lee having

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[1] Senior Circuit Judge of the Eighth Circuit, sitting by designation.

been nominal employees of different companies, but "borrowed servants" of Gulf Oil, when Perron was allegedly injured on Gulf's offshore platform by Lee's negligence, the issue in this appeal is whether the bar under the Longshore and Harbor Workers Compensation Act (LHWCA), 33 U.S.C. § 933(i), for suits against a co-employee likewise applies to this tort action (*respondeat superior*) by Perron against Lee's employer, Bell Maintenance & Fabricators Co., as held by the district court in granting summary judgment for Bell. We **AFFIRM**.

I.

In early 1985, Perron, an operator on a Gulf production platform on the outer continental shelf, allegedly slipped and fell because of oil left on the platform by Lee. Gulf did not directly employ Perron

or Lee, but instead, contracted with businesses that supply oil companies with labor. Danos & Curole Marine Contractors, Inc. (Danos), employed Perron; Bell, Lee.

Perron sued Gulf in district court in January 1986; but summary judgment was rendered against him on the basis that he was Gulf's "borrowed servant" and that, therefore, under 33 U.S.C. § 905(a), his exclusive remedy was workers' compensation under the LHWCA, 33 U.S.C. § 901 *et seq.*[2]

---

[2]

> The liability of an employer ... shall be exclusive and in place of all other liability of such employer to the employee ... on account of such injury ... except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee ... may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury .... In such action the defendant may not plead as a

This court affirmed in an unpublished opinion. ***Perron v. Gulf Oil Corp.***, 893 F.2d 344 (5th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 3273 (1990). Perron is now receiving compensation provided by Danos, his nominal employer, pursuant to its contract with Gulf, as required by the LHWCA. *See* note 2, *supra*.

In early December 1989, almost four years after filing suit against Gulf, and while the appeal from the summary judgment in favor of Gulf in that action was pending in this court (the opinion was rendered

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> defense that the injury was caused by the negligence of a fellow servant .... For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 ....

33 U.S.C. § 905(a).

late that month), Perron brought this third-party action in state court against Bell, Lee's nominal employer, under a theory of *respondeat superior*. Bell removed to federal court, but was unsuccessful in having the action transferred to the district where the action against Gulf had been filed. In early 1991, it was awarded summary judgment, the district court holding that the action was barred by 33 U.S.C. § 933(i), because Lee and Perron were both "in the same employ".[3]

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[3] Section 933(i) provides:

> The right to compensation or benefits under [the LHWCA] shall be the exclusive remedy to an employee when he is injured ... by the negligence or wrong of any other person or persons in the same employ: *Provided*, That this provision shall not affect the liability of a person other than an officer or employee of the employer.

The district court denied Perron's motion to reconsider, noting that Perron had been held by this court to be a "borrowed servant" of Gulf and that Perron did not dispute Bell's contention that Lee was also a "borrowed servant" of Gulf. Therefore, it held again that Perron and Lee were "in the same employ", even though nominally employed by different companies. The district court rejected Perron's contention that Louisiana law should be applied to the dispute, holding that the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331 *et seq.*, "provides that the LHWCA is the compensation law applicable to this case, preempting the application of the idiosyncracies of the Louisiana Workers' Compensation scheme."

II.

Summary judgment is appropriate if the record

> discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." ... In reviewing the summary judgment, we apply the same standard of review as did the district court.

Sims v. Monumental General Ins. Co., 960 F.2d 478, 479 (5th Cir. 1992) (quoting Fed. R. Civ. P. 56(c)). Because we need only apply the law to undisputed facts, this case is well suited to summary judgment. *See* ***id.*** at 480.

Under OCSLA, payments are to be made under the LHWCA for "disability or death of an employee resulting from any injury occurring as the result of [offshore] operations" of the type involved in this action. 43 U.S.C. § 1333(b). This appeal turns on 33 U.S.C. § 933(i), which substitutes LHWCA remedies exclusively for an action for an injury caused by a person

"in the same employ". *See* note 3, *supra*. While "'this provision limits an employee's rights, it ... at the same time expand[s] them by immunizing him against suits where he negligently injures a fellow worker.'" ***Sharp v. Elkins***, 616 F.Supp. 1561, 1565 (W.D. La. 1985) (emphasis omitted) (quoting Congressional comments on § 933(i)). As stated, the injured co-employee's exclusive remedy is payments guaranteed under the LHWCA. *See* ***Johnson v. American Mutual Liability Ins. Co.***, 559 F.2d 382, 390-91 (5th Cir. 1977). Under this scheme, the injured employee may receive a smaller sum than a liability judgment, but the LHWCA payments are more certain and allow the injured worker to avoid the hazards of litigation. *See* ***id.*** (construing § 905(a) immunity to extend to employer's liability carrier).

Perron contends that Bell should not be vested with § 933(i) immunity, because it is not his employer and did not provide workers' compensation payments to him (there was no *quid pro quo*). He also contends that he has a cause of action against Bell under Louisiana law.

A.

Perron's first contention is based on the assumption that § 933(i) immunizes only the employer of the injured employee. Perron cites no authority for this proposition, and we know of none. He merely cites several cases in which this court held that employers are protected by § 905(a) from liability to their employees. *See, e.g.*, ***Gaudet v. Exxon Corp.***, 562 F.2d 351, 356 (5th Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). Bell claims the protection of § 933(i), not § 905(a).

Section 933(i) does not protect employers; *it protects negligent co-employees. See id.* at 354 n.4.

1.

Perron maintains that recovery is not barred against Bell for injuries caused by Lee's negligence, because, as used in § 933(i), Lee was not "in the same employ" as he; that Lee was in the employ of Bell, while he was in the employ of Danos. In support, Perron asserts that Lee was not a borrowed servant of Gulf, but the uncontested material facts were that "[a]ll control and direction over Bell Maintenance employees such as Lee was exercised by Gulf" and that "[o]ther than the direct supervision of ... Lee by Herman Marshall [a Gulf mechanic], Gulf exercised the same control over ... Lee as Gulf exercised over

Perron."[4]

A borrowed servant becomes the employee of the borrowing employer, ***Standard Oil v. Anderson***, 212 U.S. 215 (1909), and "is to be dealt with as the servant of the [borrowing employer] and not of the [nominal employer]." ***Denton v. Yazoo & M.V. Railway Co.***, 284 U.S. 305 (1932). In ***Ruiz v. Shell Oil Co.***, 413 F.2d 310, 312-13 (5th Cir. 1969), our court adopted the borrowed servant rule for the LHWCA. *See, e.g.*, ***Melancon v. Amoco Prod. Co.***, 834 F.2d 1238, 1244 n.10 (5th Cir. 1988); ***Capps v. N.L. Baroid-NL Indus.***, 784 F.2d 615 (5th Cir.), *cert. denied*, 479 U.S. 838 (1986); ***Gaudet***, 562 F.2d at 355-57. And, borrowed servant status is a question

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[4] The day shift consisted only of Marshall and Lee; the night shift, of Perron and another Danos employee.

of law. *E.g.*, ***Melancon***, 834 F.2d at 1244.

As noted, in Perron's action against Gulf, this court held that Perron was a borrowed servant of Gulf. Furthermore, as referenced above, and as the district court noted, Perron did not dispute, in opposition to summary judgment in this action, that Lee and Perron were both borrowed servants of Gulf; *in fact, he admitted that they were*. He stated:

> [Perron] does not dispute that Lee was a borrowed servant of Gulf. Perron and Lee were borrowed servants for Gulf on the platform. However, the plaintiff contends that Lee was not a "co-employee" to serve as a bar to this tort action.

(In his supporting brief for his motion to reconsider, Perron took a different tack and *contended that Perron was not the borrowed servant of Bell*.) It goes without saying that Perron cannot admit in district court that Lee was a borrowed servant of

Gulf but deny that here.

In sum, Perron and Lee were co-workers in every meaningful sense of the term. And, because they were borrowed servants/co-employees of the same employer (Gulf), *a fortiori*, they were "persons in the same employ" under § 933(i).

2.

Given that Perron is barred by § 933(i) from bringing an action against Lee, at issue is whether Perron can bring this *respondeat superior* action against Bell, Lee's nominal employer. Consistent with the LHWCA's comprehensive scheme, Perron is barred from doing so.

In ***Nations v. Morris***, 483 F.2d 577 (5th Cir. 1973), *cert. denied*, 414 U.S. 1071 (1973), as here, the plaintiff was injured by an allegedly negligent co-employee on an oil platform on the outer

continental shelf. ***Id.*** at 579. The plaintiff sued his co-employee's liability insurer under Louisiana's direct action statute. ***Id.*** at 580. Similar to the vicarious liability claimed here, the ***Nations*** co-employee and his insurer were solidary obligors (jointly and severally liable) under Louisiana law. ***Id.*** at 586-87. Therefore, if the §933(i) defense was not personal to the co-employee, but rather "inhere[d] in the nature of the obligation", the insurer could assert it against the injured plaintiff. ***Id.*** at 587.

Nations concluded that the § 933(i) defense was available to the co-employee's solidary obligors. ***Id.*** at 587-89. It reasoned that §§ 933(i) and 905(a) do not merely remove the remedy of proceeding directly against one tortfeasor to enforce an otherwise-preserved right, but also

"completely obliterate[] the rights at common, civil or maritime law against Employer and fellow employee." *Id.* at 587.

> Congress ... has determined that the relationship gives rise only to compensation liabilities. The nature of the obligation is that there is no --the word is *no* -- obligation.
>
> * * *
>
> [LHWCA] is comprehensive. It has adjusted and rearranged the rights of maritime and other specifically covered workers. We could not hold that [LHWCA] merely cut off the remedy against the fellow employee and that since the amendment in 1959[5] there has subsisted a

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[5] Section 933 was amended in 1959 for the purpose of immuniz[ing] fellow employees against damages suits." S.Rep.No. 428, 86th Cong., 1st Sess., *reprinted in* 1959 U.S.C.C.A.N. 2134.

> The rationale of this change in the law is that when an employee goes to work in a hazardous industry he encounters two risks. First, the risk inherent in the hazardous work and second, the risk that he might negligently hurt someone else

> remedy-less right against the co-worker which had no utility until the passage of the Direct Action Statute and OCSLA with its surrogate out-reach. ... [T]he comprehensive scheme known as [LHWCA] is the *whole* source of rights and remedies.

Nations, 483 F.2d at 587-88 (emphasis in original) (footnote omitted). Restated, "[t]he prohibition of suits between co-workers under the [LHWCA] is not a personal defense but may be claimed by the negligent co-workers' solidary obligors." ***Louisiana Land & Exploration Co. v. Amoco Prod. Co.***, 878 F.2d 852, 855 (5th Cir. 1989) (citing

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> and thereby incur a large common-law damage liability. While is is true that this provision limits an employee's rights, it would at the same time expand them by immunizing him against suits where he negligently injures a fellow worker. It simply means that rights and liabilities arising within the "employee family" will be settled within the framework of the [LHWCA].

Nations, 483 F.2d at 589).

This *respondeat superior* action against Bell arises out of its employee's, Lee's, alleged negligence. However, Perron has no right to recover for Lee's negligence except as provided by the LHWCA's comprehensive scheme; the LHWCA payments are substituted for any right Perron might have had to sue Lee's employer under *respondeat superior*. (As noted, Perron has been receiving such payments from its nominal employer, Danos). ***Nations*** extended § 933(i)'s protection to the solidary obligors of negligent co-employees. And, to the extent that Bell is vicariously liable for Lee's negligence, they are solidary obligors. Just as the liability insurer in ***Nations*** was protected by § 933(i), so too is Bell. Simply put, Perron cannot assert against Bell, the

employer, his non-existent right against Lee, its employee. The fact that Bell is not Perron's employer is irrelevant to whether § 933(i) bars his action against Bell.[6]

B.

Despite OCSLA making the LHWCA applicable to injuries occurring in operations of the type involved in this action, Perron asserts that, under OCSLA,

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[6] As support for challenging the § 933(i) bar, Perron states that "Bell ... would never be obligated to Danos ... employees [such as Perron] for compensation benefits, and, thus, there is no *quid pro quo* between Bell and Perron", relying on the concurring opinion in ***West v. Kerr-McGee Corp.***, 765 F.2d 526 (5th Cir. 1985) (dealing with § 905 immunity). Section 933(i) bars liability, regardless of whether the otherwise-liable defendant provided LHWCA payments to the plaintiff. Perron confuses § 933(i) with § 905(a), which permits an injured employee to seek recovery at law if his employer "fail[ed] to secure payment of compensation as required by this chapter". This exception is not found in § 933(i).

Louisiana law should govern this case. But, by its terms, OCSLA makes state law applicable only when it is not inconsistent with federal law, providing in pertinent part:

> To the extent that they are applicable *and not inconsistent with this subchapter or with other Federal laws* ..., the civil and criminal laws of each adjacent State ... are hereby declared to be the law of the United States for [the outer continental shelf adjacent to the state].

43 U.S.C. § 1333(a)(2)(A) (emphasis added).

Section 933(i) provides that LHWCA payments "shall be the exclusive remedy to an employee when he is injured ... by the negligence or wrong of any other person or persons in the same employ." State law is, therefore, preempted by § 933 (i) in this instance.

III.

Accordingly, the judgment is

AFFIRMED.

MINUTE ENTRY
January 22, 1991
SCHWARTZ, J.

FILED
JAN 22 1:21 P.M. '91

WINSTON J. PERRON — CIVIL ACTION

VERSUS — NO. 90-0038

BELL MAINTENANCE AND FABRICATORS, INC. — SECTION "A"

This matter is before the Court on defendant's Motion for Summary Judgment based on the fellow-servant rule, and that plaintiff's exclusive remedy in this matter falls under the Longshore and Harbor Workers' Compensation Act. The motion, set for hearing on January 16, 1991, was taken under submission on briefs without oral argument.

Plaintiff filed the instant suit in state court on December 11, 1989 against Bell Maintenance for injuries sustained on or about March 3, 1985 in a slip and fall on a Gulf Oil offshore platform. Defendant

removed the action to this Court on January 3, 1990 and subsequently moved to transfer the case to the Western District of Louisiana, where a related litigation, Winston J. Perron v. Gulf Oil Corp., was already being heard. As the convenience of witnesses in the instant case would better be served by hearing this matter in the Eastern District, the court denied defendant's motion. In the related case, the Western District granted Gulf's motion for summary judgment on the grounds that Perron was its borrowed servant at the time of his accident and that his exclusive remedy was under the Longshore and Harbor Workers' Compensation Act. This ruling was affirmed by the Fifth Circuit, with certiorari denied by the United States Supreme Court, Perron v. Gulf Oil Corporation, 893 F.2d 344 (5th Cir. 1989),

cert. denied, 110 S.Ct. 3273 (1990), establishing with finality that Perron, nominally employed by Danos & Curiole as a supplier of laborers, was a borrowed servant of Gulf in the context of this accident.

Perron's current suit seeks damages against Bell Maintenance as a third-party tortfeasor, alleging that the negligence of its contracted-for employee, Mike Lee, was the proximate cause of Perron's slip and fall. Contested throughout this litigation was whether Lee was also a borrowed servant of Gulf, and therefore a fellow-servant of Perron at the time of this accident, as Bell Maintenance, like Danos & Curiole, is in the business of providing laborers and is therefore only a "nominal" employer. In plaintiff's opposition to this Motion for Summary Judgment, plaintiff no longer

disputes that Lee was also a borrowed servant of Gulf but relies on the Louisiana Supreme Court's ruling in Johnson v. Alexander, 419 So.2d 451 (La. 1982), to claim that the borrowed servant defense is inapplicable under the Outer Continental Shelf Lands Act ("OSCLA"), 43 U.S.C. 1331 et seq., and that Perron is free to avail himself of state law remedies against Bell Maintenance as a third-party employer. The Johnson case involved an action brought by a principal contractor's employee against an independent subcontractor for the alleged negligence of that subcontractor's employee in causing the injury. Interpreting the Louisiana Workers' Compensation scheme as not providing immunity from suit to a statutory co-employee who injures the principal's employee during the course and scope of his

employment, and finding that the offending employee was neither a borrowed servant nor a statutory employee of the principal contractor, the Court held that the plaintiff therein was not precluded from bringing suit against the subcontractor as a third-party tortfeasor. Johnson, supra, at 454. The Johnson case is clearly inapposite to the instant case because (1) it is now undisputed in this case that both Winston Perron and Mike Lee were fellow-, borrowed servants of Gulf at the time of this casualty, and (2) OSCLA provides that the LHWCA is the compensation law applicable to this case.

The issue of whether a relationship of borrowed servant existed between plaintiff and Gulf Oil has already been answered in the affirmative, Perron v. Gulf Oil Corp., supra, and plaintiff's opposition herein no

longer disputes that Lee was also a borrowed servant of Gulf at the time of this accident. OSCLA provides that LHWCA applies to disability or death resulting from any injury to an employee on the outer Continental Shelf when engaged in the activities underlying this accident. 43 U.S.C. § 333(b) (West 1986). As both Perron and Lee were fellow-, borrowed servants of Gulf at the time of Perron's accident on the oil platform, an action cannot lie against Bell Maintenance as the supplier of Lee's labor and Lee's nominal employer. Perron's only remedy in this situation is compensation under the LHWCA scheme, as the acts complained of were acts of a fellow-servant. Nations v. Morris, 483 F.2d 577 (5th Cir. 1973); Sharp v. Elkins, 616 F.Supp. 1561 (W.D. La. 1985). See also Capps v. N.L. Baroid-NL

Industries, Inc., 784 F.2d 615 (5th Cir.), cert. denied, 107 S.Ct. 141 (1986); West v. Kerr-McGee Corp., 765 F.2d 526 (5th Cir. 1985); 33 U.S.C. §§ 904(a), 905(a), 933(i) (West 1986).

Accordingly, for all the aforesaid reasons, defendant's Motion for Summary Judgment is GRANTED and the Clerk of Court is directed to enter judgment dismissing plaintiff's claims with prejudice.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
MAR 16 8:37 PM '91

WINSTON J. PERRON	CIVIL ACTION
VERSUS	NO. 90-0038
BELL MAINTENANCE AND FABRICATORS, INC.	SECTION "A"

ORDER AND REASONS

This matter is before the Court on plaintiff's Motion to Alter or Amend Judgment in the above referenced matter.[1] This matter was previously before the Court on defendant's Motion for Summary Judgment based on the fellow servant rule, and that

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[1] As no new information or issues are actually raised in plaintiff's Rule 59(e) motion, the Court is treating it as a "Motion for Reconsideration." Although the Federal Rules of Civil Procedure make no mention of a motion as such, Courts routinely can and should entertain them when an obvious error has been made.

plaintiff's exclusive remedy in this matter lies under the Longshore and Harbor Workers' Compensation Act ("LHWCA"). By Minute Entry dated January 22, 1991, this Court granted defendant's motion for summary judgment, dismissing plaintiff's claims with prejudice, on the principles first set forth by the Fifth Circuit in Nations v. Morris, 483 F.2d 577 (5th Cir.), cert. denied, 414 U.S. 1071, 94 S.Ct. 584 (1973). The current motion, set for hearing February 27, 1991, was taken under submission on briefs without oral argument.

Plaintiff filed this suit against Bell Maintenance in the Louisiana state court on December 11, 1989 for injuries sustained on or about March 3, 1985 in a slip and fall accident on a Gulf Oil Corporation offshore platform. Defendant removed the action to this Court on January 3, 1990 and

subsequently moved to transfer the case to the Western District of Louisiana, where a related litigation, Winston J. Perron v. Gulf Oil Corp., was already being heard. As the convenience of witnesses in the instant case were better served by hearing this matter in the Eastern District of Louisiana, this Court denied defendant's motion to transfer. In the related case, the Western District of Louisiana granted Gulf's motion for summary judgment on the grounds that Perron was its borrowed servant at the time of his accident and that Perron's exclusive remedy was under the Longshore and Harbor Workers' Compensation Act. This ruling was affirmed without opinion by the Fifth Circuit, with certiorari denied by the United States Supreme Court, Perron v. Gulf Oil Corporation, 893 F.2d 344 (5th Cir. 1989),

cert. denied, 110 S. Ct. 3273 (1990), establishing with finality that Perron, nominally employed by Danos & Curiole in its role as a supplier of laborers, was a borrowed servant of Gulf in the context of this accident.

Perron's suit here in the Eastern District sought damages against Bell Maintenance as a third-party tortfeasor, alleging that the negligence of its contracted-for employee, Mike Lee, was the proximate cause of his slip and fall. Previously contested throughout this litigation was whether Mike Lee was also a borrowed servant of Gulf, and therefore a fellow servant of Perron at the time of this accident. Bell Maintenance, like Danos & Curiole, is in the business of providing laborers and is therefore only a

nominal employer.[2] In Perron's opposition to Bell Maintenance's motion for summary judgment, Perron did not dispute that Mike Lee was also a borrowed servant of Gulf at the time of the accident and asserted that both were borrowed employees of Gulf (Plaintiff's Opposition Memorandum at page 5), thereby obviating the need for application and analysis of the Ruiz factors[3] to Mike Lee. Plaintiff then relied on the Louisiana Supreme Court's ruling in Johnson v. Alexander, 419 So.2d

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[2] The apparent practices of the offshore oil industry is to employ agents like Bell Maintenance and Danos & Curiole to find and supply oil firms with laborers. The laborers' wages are paid out through these agents, with LHWCA compensation also paid out through these agents, with all the costs of same ultimately passed on to the oil firms as part of the costs of the entire operation.

[3] Ruiz v. Shell Oil Company, 413 F.2d 310 (5th Cir. 1969), sets out the nine factors to be examined and weighed in the determination of "borrowed servant" status.

451 (La. 1982), interpreting the Louisiana Workers' Compensation scheme, to assert that the borrowed servant defense, and the fact that both Perron and Lee were therefore fellow servants of Gulf at the time of this accident, was an inapplicable doctrine under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. 1331 et seq. (West 1986). Plaintiff insisted, and insists still, that Perron is free to avail himself of state law remedies against Bell Maintenance as a third-party respondeat superior. The Court disagreed, and disagrees still. The Johnson case asserted by plaintiff involved an action brought by a principal contractor's employee against an independent subcontractor for the alleged negligence of that subcontractor's employee in causing the injury. Interpreting the Louisiana Workers'

Compensation scheme as not providing immunity from suit to a statutory co-employee who injures the principal's employee during the course and scope of his employment, and finding that the offending employee was neither a borrowed servant nor a statutory employee of the prinicipal contractor, the Louisiana Supreme Court held that the plaintiff therein was not precluded from bringing suit against the subcontractor as a third-party tortfeasor. Johnson, supra, at 454. The Johnson case is clearly inapposite to the case before this Court because (1) it is undisputed that both Winston Perron and Mike Lee were fellow/borrowed servants of Gulf at the time of this accident, and (2) OSCLA provides that the LHWCA is the compensation law applicable to this case, preempting the application of the idosyncrasies of the

Louisiana Workers' Compensation scheme. See Nations v. Morris, supra at 585 (that LHWCA is clearly a sufficient system and its provisions as to the liability of fellow employees must --along with the entire remainder of LHWCA-- be the law for workers injured in connection with operations involving removal or development of natural resources from the Outer Continental Shelf).

OCSLA provides that LHWCA applies to disability or death resulting from any injury to an employee on the outer Continental Shelf when engaged in the activities underlying the accident complained of in this case. 43 U.S.C. §1333(b) (West 1986). LHWCA provides that "[t]he right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is

injured...by the negligence or wrong of any other person or persons in the same employ: Provided, That this provision shall not affect the liability of a person other than an officer or employee of the employer." 33 U.S.C. §933(i) (West 1986)(emphasis in original). As both Perron and Lee were fellow, albeit borrowed, servants of Gulf at the time of Perron's accident on the oil platform, Perron cannot bring an action against Lee; accordingly, a third-party respondeat superior tortfeasor action cannot be brought against Bell Maintenance as the supplier of Lee's labor and Lee's nominal employer. Perron's only remedy in this situation is compensation under the LHWCA scheme, which compensation has been and will continue to be provided, as the negligent acts complained of were acts of a fellow servant at the time of this

accident. 33 U.S.C. §§ 904(a), 905(a), 933(i) (West 1986); Nations v. Morris, supra; Sharp v. Elkins, 616 F.Supp. 1561 (W.D. La. 1985). See also Capps v. N.L. Baroid-NL Industries, Inc., 784 F.2d 615 (5th Cir.), cert. denied, 107 S. Ct. 141 (1986); West v. Kerr-McGee Corp., 765 F.2d 526 (5th Cir. 1985).

Accordingly, for all the aforesaid reasons, plaintiff's Motion To Alter Or Amend Judgment in the above referenced matter is hereby DENIED.

New Orleans, Louisiana, this 15th day of March, 1991.

CHARLES SCHWARTZ, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-3351

FILED
SEPT 22 1992

WINSTON J. PERRON,

Plaintiff-Appellant,

UNITED STATES FIRE INSURANCE COMPANY,

Intervenor-Appellant,

versus

BELL MAINTENANCE AND FABRICATORS, INC.,

Defendant-Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 8/21/92), 5 Cir., 19___, _____ F.2d _____)

(September 22, 1992)

Before BRIGHT*, JOLLY, and BARKSDALE,

Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the

suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Rhesa H. Barksdale
United States Circuit Judge

* Senior Circuit Judge of the Eighth Circuit, sitting by designation.

APPENDIX B

33 U.S.C. 902(3):

"The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include:

(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;

(E) aquaculture workers;

(F) individuals employed to build, repair or dismantle any recreational vessel under sixty-five feet in length;

(G) a master or member of a crew of any vessel; or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law."

33 U.S.C. 902(4):

"The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, maritime railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

33 U.S.C. 904(a):

"Every employer shall be liable

for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor."

33 U.S.C. 905(a):

"The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death

results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title."

33 U.S.C. 933(a):

(a) Election of remedies

"If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person."

33 U.S.C. 933(h):

> "**(h) Subrogation**
>
> Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section."

33 U.S.C. 933(i):

> "**(i) Right to compensation as exclusive remedy**
>
> The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided*, That this provision shall not affect the liability of a person other than an officer or employee of the employer."